

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:14-HC-2234-FL

MATTHEW GALE,

Petitioner,

v.

BOBBY MARSHALL,

Respondent.

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ORDER

Petitioner petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is before the court on respondents' motion to dismiss without prejudice petitioner's § 2254 petition as a second or successive habeas petition (DE 10). Also before the court is petitioner's "motion to dismiss second or success habeas petition without prejudice" (DE 13).

Petitioner seeks voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a)(1)(A). An action may be dismissed voluntarily by the petitioner without order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment. See Fed. R. Civ. P. 41(a)(1). Otherwise an action shall not be dismissed on the petitioner's request except upon an order of the court. See Fed. R. Civ. P. 41(a)(2).

Because respondent has filed an answer, petitioner's action may only be voluntarily dismissed pursuant to rule 41(a)(2) which permits voluntary dismissal "on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). A petitioner's motion under Rule 41(a)(2) should not

be denied absent substantial prejudice to the defendants. Andes v. Versant Corp., 788 F.2d 1033, 1036 (4th Cir. 1986).

Here, petitioner seeks voluntary dismissal of this action so that he may seek authorization from the Fourth Circuit Court of Appeals to file a second or successive § 2254 petition. The court finds this reasoning consistent with rule 41(a)(2). Accordingly, petitioner's motion for voluntary dismissal of this action (DE 13) is GRANTED, and the action is DISMISSED without prejudice. Respondent's motion to dismiss (DE 10) is DENIED as MOOT. The clerk of court is DIRECTED to close this case.

SO ORDERED, this the 24th day of June, 2015.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

LOUISE W. FLANAGAN
United States District Judge